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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF NEVADA**

5 * * *

6 Michael Morton,

7 Plaintiff,

8 v.

9 Rocky Mountain Hospital and Medical
10 Services, Inc. dba Anthem Blue Cross and
11 Blue Shield,

Defendant.

Case No. 2:23-cv-01320-GMN-DJA

Order

12 This is an ERISA case in which Plaintiff Michael Morton alleges that Defendant Rocky
13 Mountain Hospital and Medical Services, Inc. dba Anthem Blue Cross Blue Shield (“Anthem”)
14 erroneously denied his request for authorization to undergo spine surgery. Morton sues Anthem
15 for damages, alleging one claim for recovery of benefits under the Employee Retirement Income
16 Security Act of 1974 (“ERISA”). (ECF No. 27). Both Morton and Anthem move the Court to
17 decide the standard of review applicable to deciding Morton’s claim. (ECF No. 41) (Anthem’s
18 motion); (ECF No. 45) (Morton’s motion); (ECF No. 47) (Morton’s sealed motion). Morton also
19 moves to seal an erratum to his motion and his reply in support of his motion. (ECF No. 53)
20 (motion to seal erratum); (ECF No. 55) (motion to seal reply).

21 Because the Court finds that it cannot decide the standard of review at this stage, it denies
22 the motions to determine the standard of review and orders the parties to undergo limited
23 discovery related to the standard of review. Because Anthem has made the confidentiality
24 designations over the documents Morton seeks to seal, but has not filed a declaration supporting
25 their sealing, the Court will deny the motions to seal and will keep the documents sealed for thirty
26 more days so that Anthem may move to seal them. And because the Court declines to decide the
27 standard of review, the Court will alter the parties’ scheduling order to set concrete deadlines for
28 forthcoming briefing.

1 **I. Background.**

2 Morton has a history of cervical spine problems. (ECF No. 45 at 2). In 2012, he
3 underwent a two-level spinal fusion surgery at levels C5-C7. (*Id.*). When he began experiencing
4 new problems at C4-C5, his doctor—Dr. Daniel C. Lu, a spinal surgeon based at the UCLA
5 Department of Neurology—recommended that Morton undergo an Artificial Disc Replacement to
6 address the deteriorated disc at level C4-C5. (*Id.* at 3). Morton’s records were submitted to
7 Anthem in May of 2022, to obtain approval for the procedure. (*Id.*). On May 11, 2022, Anthem
8 denied the claim, stating:

9 Your doctor wants you to have surgery to remove a gel pad between
10 your neck bones and replace it with a new gel pad. We reviewed
11 the notes we received. The notes show that you had neck surgery in
12 the past. The surgery in the past joined the bones in your neck. You
cannot have a gel pad replaced if your neck bones are joined
together.

13 (*Id.* at 4).

14 Anthem asserts that an experienced health care professional performed the review of
15 Morton’s request. (ECF No. 41). Morton asserts that the claim letter fails to identify the person
16 who made the decision, their qualifications, and the materials they considered. (ECF No. 45 at 2).
17 Morton adds that the reason for the denial was factually incorrect because he sought surgery on a
18 different part of the spine than where he received the spinal fusion. (*Id.* at 4). Morton received
19 another denial letter the very next day, stating “[w]e still can’t approve your request,” and again
20 listing the same reasons for denial. (*Id.*). Morton asserts that the second letter also failed to
21 identify the decisionmaker, their qualifications, and the materials they considered. (*Id.*). Morton
22 asserts that the letter he received one day later is unusual and appears “consistent with a biased
23 claims handling process.” (*Id.*). Morton’s provider participated in a peer-to-peer review of the
24 request with Anthem’s physicians. (*Id.*). Morton asserts that the peer-to-peer review went
25 poorly, that the medical providers for Anthem were unfriendly, argumentative, and appeared to
26 have made up their minds to not approve the procedure. (ECF No. 45 at 5).

27 On May 25, 2022, Morton’s provider submitted an appeal on Morton’s behalf. (ECF No.
28 41 at 3). Anthem asserts that three of its physician reviewers ultimately reviewed all the

1 documentation submitted in connection with the appeal along with the initial request and decided
2 that the surgery was not medically necessary. (*Id.*). Anthem sent Morton a letter upholding its
3 denial on June 24, 2022. (ECF No. 45 at 6). That letter stated that Dr. Lu “filed an appeal on
4 your behalf for authorization to have surgery to remove a gel pad between your neck bones and
5 replace it with a new gel...” (*Id.*). Morton asserts that this letter still mischaracterized the
6 surgery because Dr. Lu was not proposing to remove and replace any gel pad, but to insert one for
7 the first time. (*Id.*). The letter also reiterated the prior reason for denial, that the “notes show that
8 [Morton] had neck surgery in the past,” which “joined the bones in [his] neck,” and that “[y]ou
9 cannot have a gel pad replaced if your neck bones are joined together.” (*Id.*). Morton asserts that
10 this letter, unlike the prior ones, identified two decisionmakers. (*Id.*). But neither are
11 neurological surgeons. (*Id.*). One was a family medicine doctor and the other specialized in
12 internal medicine. (*Id.*).

13 Morton asserts that he prepared a detailed letter on July 29, 2022, appealing the decision,
14 and sent it to Anthem via FedEx. (*Id.* at 7-8). Anthem asserts that it is unable to confirm that it
15 ever received the letter. (ECF No. 48 at 3-4). It also points out that the FedEx tracking document
16 states that the letter was delivered to a “residence,” although the address to which it was delivered
17 is Anthem’s Denver, Colorado address.¹ (*Id.*). Morton points out that the FedEx tracking
18 document shows that the letter was delivered on August 8, 2022. (ECF No. 45 at 8). But Anthem
19 did not respond to this letter and the letter does not appear in the file that Anthem produced to
20 him in connection with this case. (*Id.*).

21 Morton called Anthem after not hearing back, but was informed that his case had been
22 closed. (*Id.* at 9). Anthem’s records show that the case was closed as of June 24, 2022. (ECF
23 No. 45 at 9). Morton claims that he asked the representative if they had received the letter, but
24 the representative did not answer yes or no. (*Id.*). Morton asserts that the representative told him

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26 ¹ Anthem also argues that the tracking document is not authenticated because Morton did not
27 include a declaration with his motion. (ECF No. 48 at 4). Morton acknowledges this in his
28 erratum, attaching the declaration and explaining that his failure to do so was error. (ECF No.
52). Given the fact that Morton filed the declaration, the Court declines to question the
authenticity of the tracking document.

1 that a team leader would call Morton back in the next twenty-four to forty-eight hours, but
2 Morton never received a call. (*Id.*). Morton ultimately traveled to Germany, where surgery was
3 much cheaper, in the fall of 2022 to undergo the recommended surgery, paying \$60,000 out of
4 pocket. (*Id.*). Morton filed his initial complaint in this action on June 20, 2023, in state court.
5 (ECF No. 1 at 2).

6 Anthem argues that the Court should employ an abuse of discretion standard of review
7 when considering its decision to deny Morton’s claim because the healthcare plan gave it
8 “complete discretion to determine the administration of [Morton’s] benefits.” (ECF No. 41).
9 Morton argues that, despite the discretionary authority the plan gave Anthem, the Court should
10 decide the case with a *de novo* standard because Anthem has a conflict of interest in both
11 administering the plan and paying benefits and because Anthem engaged in flagrant violations of
12 the ERISA procedural requirements. (ECF No. 45). In the alternative, Morton proposes that the
13 Court should defer deciding the standard of review, and allow the parties to engage in limited
14 discovery regarding the alleged procedural irregularities in handling Morton’s claim and whether
15 those alleged violations were flagrant. (*Id.* at 15-16). Anthem opposes that proposal. (ECF No.
16 48 at 6-7).

17 **II. Discussion.**

18 **A. *Motions to determine the standard of review.***

19 The primary purpose of the Employee Retirement Income Security Act of 1974
20 (“ERISA”) is “to provide a method for workers and beneficiaries to resolve disputes over benefits
21 inexpensively and expeditiously.” *Taft v. Equitable Life Assur. Soc.*, 9 F.3d 1469, 1472 (9th Cir.
22 1993) (internal quotations and citations omitted) (overruled on other grounds by *Abatie v. Alta*
23 *Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006)). Generally, district courts review an ERISA
24 plan administrator’s decision to deny benefits *de novo*, “unless the benefit plan gives the
25 administrator discretionary authority to determine eligibility for benefits or to construe the terms
26 of the plan.” *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). If the plan “does
27 confer discretionary authority as a matter of contractual agreement, then the standard of review
28

1 shifts to abuse of discretion,” which is a “more lenient” standard of review.” *Abatie*, 458 F.3d at
2 963 (emphasis removed).

3 The appropriate scope of discovery in ERISA cases “is directly related to the standard of
4 review employed by the Court.” *Santos v. Quebecor World Long Term Disability Plan*, 254
5 F.R.D. 643, 647 (E.D. Cal. 2009). Under *de novo* review, the district court may consider
6 evidence outside of the administrative record. *Abatie*, 458 F.3d at 969-70. Abuse of discretion
7 review is typically confined to the administrative record. *Id.*

8 However, even if the plan confers discretionary authority, the “court may, in its discretion,
9 consider evidence outside the administrative record to decide the nature, extent, and effect on the
10 decision-making process of any conflict of interest.” *Id.* In cases where procedural irregularities
11 are alleged, typically the standard of review will be abuse of discretion unless the violations are
12 flagrant. *Id.* at 972-73. When procedural irregularities are apparent in an administrator’s
13 determination, a court may consider extrinsic evidence to determine the effects of the irregularity.
14 *Pac. Shores Hosp. v. United Behav. Health*, 764 F.3d 1030, 1041 (9th Cir. 2014). It may also
15 take additional evidence when the irregularities have prevented full development of the
16 administrative record. *Abatie*, 458 F.3d at 973. A failure to comply with procedural requirements
17 ordinarily will not alter the standard of review unless the irregularities are substantial. *Id.* at 971
18 (explaining that irregularities must be wholesale and flagrant for *de novo* review to apply).

19 Here, the Court is without sufficient information to decide the standard of review. For
20 example, it is not clear what exactly happened at the peer-to-peer meeting that Morton asserts
21 went poorly. Additionally, Morton sent what he asserts is a second-level appeal to Anthem at its
22 address, but Anthem was unable to confirm that it ever received the letter.

23 While Anthem argues that Morton has provided no authority to support his request that
24 the Court allow limited discovery before deciding the standard of review, Morton points to at
25 least two court cases in this district that have permitted limited discovery in ERISA cases before
26 determining the standard of review. *See Medford v. Metropolitan Life Ins. Co.*, 244 F.Supp.2d
27 1120, 1123 (allowing certain discovery to proceed because “the court cannot determine at this
28 early stage of the litigation what standard of review should be applied to the determination of this

1 action”); *see Burris v. First Reliance Standard Life Ins. Co.*, No. 2:20-cv-00999-APG-BNW,
2 2021 WL 12302192, at *3-5 (D. Nev. June 2, 2021) (allowing certain discovery related to
3 procedural irregularities to proceed before determining the standard of review). Additionally,
4 Anthem’s argument that Morton must first show that Anthem behaved flagrantly before seeking
5 discovery about that flagrant behavior places Morton in an impossible position. Moreover,
6 Morton has alleged that Anthem breached its fiduciary duty and that Anthem breached the terms
7 of the plan. (ECF No. 27). So, any discovery regarding whether Anthem flagrantly violated
8 ERISA is both relevant and proportional to Morton’s allegations. *See* Fed. R. Civ. P. 26(b)(1).

9 The Court declines to decide the standard of review. Instead, it will allow for a limited,
10 forty-five-day period of discovery. That discovery is limited to whether Anthem’s decision
11 contained procedural irregularities, the effects of those irregularities, and whether those
12 procedural irregularities are substantial or flagrant. The Court denies the motions to determine
13 the standard of review without prejudice so that the parties may re-file them after conducting this
14 discovery.

15 ***B. Motions to seal.***

16 Morton seeks to seal the errata to his motion to determine the standard of review. (ECF
17 No. 53). He also seeks to seal his reply in support of his motion. (ECF No. 55). The sole reason
18 that Morton seeks to seal the documents is that Anthem has marked them as confidential. But
19 Anthem has not provided a declaration establishing sufficient justification for sealing each
20 document at issue as required by the Court’s supplemental protective order. (ECF No. 34). That
21 order provides the following:

22 The fact that the Court has entered the instant stipulated protective
23 order and that a party has designated a document as confidential
24 pursuant to that protective order does not, standing alone, establish
25 sufficient grounds to seal a filed document. *See Foltz v. State Farm*
26 *Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1133 (9th Cir. 2003); *see also*
27 *Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.
28 1992). If the sole ground for a motion to seal is that the opposing
party (or non-party) has designated a document as confidential, the
designator shall file (within seven days of the filing of the motion to
seal) either (1) a declaration establishing sufficient justification for
sealing each document at issue or (2) a notice of withdrawal of the

1 designation(s) and consent to unsealing. If neither filing is made,
2 the Court may order the document(s) unsealed without further
notice.

3 (*Id.* at 3).

4 Because the motions themselves do not provide sufficient justification to seal the
5 documents at issue, the Court denies them. However, the Court will maintain the documents at
6 issue (filed at ECF Nos. 56 and 57) under seal for thirty days to give Anthem time to either:
7 (1) move to seal the documents, which motion must establish sufficient justification for sealing
8 the documents; or (2) file a notice of withdrawal of the confidentiality designations and consent to
9 unsealing. If the Court receives neither, it will order the documents to be unsealed.

10 **C. *Scheduling.***

11 Because the Court has denied the motions to determine the standard of review without
12 prejudice so that the parties may file them again after conducting discovery, and in the interest of
13 having concrete deadlines, the Court also modifies the parties' discovery plan. The Court does
14 not modify the deadline for Anthem to produce the administrative record or the deadline for the
15 parties to engage in good faith settlement, because those deadlines have passed.

16
17 **IT IS THEREFORE ORDERED** that Anthem and Morton's motions to determine the
18 standard of review (ECF Nos. 41, 45, 47) are **denied without prejudice**.

19 **IT IS FURTHER ORDERED** that the parties shall have until **March 13, 2025**, to
20 conduct discovery regarding the appropriate standard of review as discussed in this order.


21 **IT IS FURTHER ORDERED** that Morton's motions to seal (ECF Nos. 53, 55) are
22 **denied**.

23 **IT IS FURTHER ORDERED** that Anthem shall have until **February 26, 2025**, to file a
24 motion to seal the documents filed at ECF Nos. 56 and 57 or to file a notice of withdrawal of the
25 confidentiality designations and consent to unsealing. If the Court receives neither by February
26 26, 2025, it will order the documents to be unsealed.

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Close of limited discovery period:	March 13, 2025
Deadline for motions regarding standard of review:	April 14, 2025
Merits briefing:	
Plaintiff's opening brief:	August 14, 2025
Defendant's response:	September 15, 2025
Plaintiff's reply:	October 15, 2025

DATED: January 27, 2025


DANIEL J. ALBREGTS
UNITED STATES MAGISTRATE JUDGE